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STATE OF MONTANA

Case No: DA 09-0632

IN THE SUPREME COURT
OF THE STATE OF MONTANA

DEREK STEBNER and STEBNER REAL ESTATE, INC.,
A Washington Corporation,

Appellants,

-vs-

ASSOCIATED MATERIALS, INC. (AMI) d/b/a ALSIDE,
Appellee.

APPELLANTS' REPLY BRIEF

On Appeal from the
Montana Fourth Judicial District,
Missoula County, The Honorable Ed. McLean Presiding
Missoula County District Court Cause No. DV-05-571

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COME NOW Appellants, through undersigned counsel, and Reply to Appellee's Brief as follows.

I. INTRODUCTION

Undisputed evidence demonstrates the fact that information not presented by the parties was actively sought by a juror and brought to the attention of other jurors during deliberations. Laurie Schneider, one of the jurors in this case, admits to seeking an online definition of the word "preponderance" during a break in deliberations. This act was in direct opposition to the admonishment and instructions provided by the District Court. The parties had already provided the jury with the definition of preponderance which was legally appropriate. Schneider's actions tainted the deliberation process and eliminated Appellants' ("Stebner") right to a fair trial, free from outside influences.

Internet access is continuously becoming more and more available. There are numerous examples of juror Internet research tainting the trial process and requiring a new trial. This is one such case. Appellants request that the Court establish a bright-line rule whereby a new trial is granted whenever Internet research is conducted by a juror. Jurors cannot be allowed to access the Internet during trial and deliberations. Every time this

is done, there is incurable prejudice. Taking a relaxed approach in regard to this ever growing problem will result in a patchwork of discretionary remedies administered at the District Court level that will further erode the citizenries' right to a fair and impartial hearing by a jury of its peers.

II. ARGUMENT

A. Appellants Not Attacking Internal Influences on the Jury

Rule 606(b) allows jurors to testify regarding "extraneous prejudicial information [] improperly brought to the jury's attention" and any "outside influence was brought to bear upon any juror." Mont. R. Evid. 606(b). Juror Laurie Schneider admits she consulted an online legal definition of the word "preponderance" during a break in jury deliberations. Affidavit Lauri Schneider, ¶ 4 (Sept. 25, 2009). Likewise, Schneider does not dispute the fact that the online definition was mentioned in the jury room prior to the time the verdict was rendered. *Id.* Juror Christine Strukel confirms that an online definition of the term preponderance was used during the course of deliberations. Affidavit Christine Strukel, ¶ 8.

Rather than accept these uncontroverted facts and admit that an outside influence was brought to bear on at least one juror, Appellee ("Alside") concocts its own definition of "outside influence." Appellee's

Br., p. 12-22. It claims that an online definition is an "internal influence;" nothing more than the juror's "own knowledge and experience." Id. at p. 14. Alside's claim is that, because Schneider did not bring an actual dictionary or printed definition into the jury room, there was no outside influence. Id. at p. 17-18. This argument is wrong-headed.

An outside influence need only be "brought to bear upon any juror." It is undisputed that Schneider consulted an outside influence, the Internet, during the deliberation process. She did not have the information she gained from her Internet research prior to the deliberations. The process was tainted at that time. She was not required to further taint the process by printing the definition and handing it out to the rest of the jurors. Alside is simply manufacturing a requirement – that a physical manifestation of the outside influence be present in the jury room – which is not present in Montana's case law. *See e.g.*, *Brockie v. Omo Constr.* (1992), 255 Mont. 495, 844 P.2d 61 (granting a new trial based on one juror's library research during the deliberation process, even though no tangible research results were taken to the jury room).

Schneider's "subjective understanding" of the "preponderance" definition was either changed or confirmed by her research. Either way, her

research provided her with information which was not a part of her "knowledge and experience" prior to or during the course of the trial. Alside's claim that there was no outside influence cannot be taken seriously considering the fact that Schneider admits conducting Internet research while deliberations were ongoing. Schneider's online research, at a minimum, influenced her own decision-making process. Thus, tainting the sanctity of the jury system.

The majority of the cases discussed by Alside are inapplicable. *McGillen v. Plum Creek Timber Co.*, 1998 MT 193, 290 Mont. 264, 964 P.2d 18 (juror's knowledge of a witness acquired prior to trial); *State v. Kelman* (1996), 276 Mont. 253, 915 P.2d 854 (juror's belief, based on experiences which occurred prior to trial, that the defendant owned a strip bar); *Williams Feed, Inc. v. Dept. of Transp.*, 2007 MT 79, 336 Mont. 493, 155 P.3d 1228 (juror's casual observation of a condition relevant to the case). Both *McGillen* and *Kelman* involve information which was not sought during trial while Schneider obtained her information regarding the "preponderance" definition during the course of jury deliberations. Those cases clearly do not apply. *Williams Feed* is distinguishable because the juror made a casual observation during a lunch recess rather than seeking

out information to help him decide the case, as Schneider did. Where a simple casual observation is made, it may be possible to objectively determine the scope of such an outside influence and render a decision regarding its influence on the process. Here, Schneider actively conducted research on the foundational issue before the jury, *i.e.,* the standard of proof. Moreover, having taken such a proactive steps, there simply is no way to objectively determined what other influences may have been brought to bear during the course of Schneider's research. This Court may not be able to completely shield jurors from casual observations in the normal course of a day, but it can, and should, take a strict approach to disallowing a juror from actively seeking outside information through the Internet that influences the outcome of the deliberation process.

Alside admits that a telephone call would be involve extraneous prejudicial information. Appellee's Br., p. 19. Certainly, a telephone call is much more analogous to Internet research than the situations in *McGillen, Kelman*, and *Williams Feed*. Likewise, *Allers v. Riley* (1995), 273 Mont. 1, 901 P.2d 600, which actually involved the use of a dictionary, is more applicable than the cases relied upon by Alside.

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The attempts by Alside to argue that this is not a case involving extraneous information are confused. During a break in deliberations, juror Schneider consulted the Internet to help her in deciding the case. The Internet definition sought by Schneider was not put before the jury by either party and, in fact, the parties specifically provided the jury with the definition the jury was required to use. Under these facts, it is beyond argument that an external influence was brought to bear on the jury deliberations.

B. Stebner Was Prejudiced by Extraneous Information and this Court Should Establish a Bright-line Rule Requiring a New Trial Whenever Jurors Conduct Internet Research During Deliberations

Alside next argues that while there may be prejudice, there is not enough prejudice to grant a new trial. While, as argued by Stebner in its opening brief, there is sufficient prejudice to warrant a new trial, a bright line must be drawn in order to prevent arguments such as the one set forth by Alside. Both Alside and the juror at issue downplay the significance of the juror's actions. They admit she disobeyed the Court's admonishment to refrain from consulting outside sources as well as the Court's instruction on the same issue but, in their eyes, the issue is unimportant. Alside asks this

Court to conclude that the jury process in this litigation was simply not tainted enough. This stance is dangerous considering the increasing prevalence and availability of online resources to jurors.

Recently, The Montana Lawyer included an article titled, "Mistrial by IPhone." Schwartz, John, The Montana Lawyer, "Mistrial by IPhone, Juries' Web Research Upends Trials" (Aug./Sept. 2009) (Exhibit A). The article describes a recent trial in which nine jurors were conducting online research using iPhones and Blackberrys during the course of the trial and discusses other trials which were corrupted by the use of Internet technology. *Id.* This trend, the author wrote, "is wreaking havoc on trials around the country, upending deliberations and infuriating judges." *Id.* While "jurors might think they are helping, not hurting, by digging deeper...the rules of evidence, developed over hundreds of years of jurisprudence, are there to ensure that the that go before a jury have been subjected to scrutiny and challenge from both sides[.]" *Id.*

The dangerous trend of Internet research by jurors was also highlighted in a recent ABA article. Frederick, Jeffrey T., The Brief, "You, the Jury, and the Internet" (Winter 2010) (Exhibit B). As stated in this article, "The increasingly prominent role the Internet plays in American

society...poses a potential threat to the integrity of jury trials from the influence of outside information, both before and during trials." *Id.* Several instances of jury Internet research are discussed in the article.

Most likely, Schneider believed she was helping the process by consulting an outside resource. Her belief, however, was mistaken. The definitions for terms like "preponderance" are finely tuned and even the most minute difference can prejudice a case and destroy the parties' rights to a fair and impartial jury trial. Obviously, the definition was essential to this case – it set the burden of proof. To say that this case was not tainted enough turns a blind eye to the fact that the jury process in this cases was tainted. The citizenry is entitled to an untainted jury process. Once subjective interpretation is introduced into the determination of the degree to which the process has been tainted, that right is lost forever. It is undisputed that Stebner was prejudiced by Schneider's outside Internet research and, therefore, a new trial should be granted to restore his right to a fair and impartial determination by a jury of his peers.

This is an important issue which is facing all courts, as demonstrated by the articles discussed herein. A bright line should be drawn. A new trial should be granted in any case where the jury conducts Internet research,

regardless of whether or not the juror or the party opposing the new trial believes the research was insignificant. There is little doubt that this issue will be raised more and more often in the future. Declaring a bright-line rule would not only require District Courts to be more firm in their admonishments to the jurors but remove any subjective variable from the resolution when the issue arises. Jurors will be made aware from the outset of the proceedings the consequences of such conduct.

C. Request for Oral Argument

Stebner believes that the issue of Internet research by jurors is one that will have a significant impact on the Montana court system. The Court's decision regarding how to deal with these situations will be very important to everyone involved in the judicial process and warrants a full hearing by this Court. For these reasons, Stebner respectfully requests oral argument on this case.

III. CONCLUSION

A new trial should be granted. Stebner's right to a jury trial free of outside influences was violated when Schneider took the initiative to conduct online research regarding an essential element used in deciding the case. The Court must draw a hard line and declare that a new trial should be

granted any time a juror conducts outside research in order to better prevent this type of situation from occurring in the future.

DATED this 26 day of April, 2010.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon the following individuals by the means designated below this 26th day of April, 2010:

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The undersigned does hereby certify that pursuant to Mont.R.App.P. 11(4)(a) the Appellants Reply Brief:

X Is Proportionately-spaced and does not exceed 10,000 words (for principal briefs) or 5,000 words (reply briefs).

X This Brief contains 1,896 words.

DATED this 26 day of April, 2010:

Christopher Dorn

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